TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 331.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JUNE 29, 1906.

(20,296.)

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1 Pleas before the Honorable The Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 17th day of June, 1905.

ADAMS EXPRESS COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Laurel Circuit Court.

Be it remembered that heretofore, to-wit: on the 25th day of July, 1904, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals a transcript of record, in words and figures as follows, to-wit:

Laurel Circuit Court, May Term, 1904.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Bill of Exceptions.

Ind'ct. #195.

Pleas before the Honorable H. C. Faulkner, Judge of the Laurel Circuit Court.

2 Be it remembered that at the February Term, of the Laurel Circuit Court, 17th day of February, 1904, the following order was made, to-wit:

Now comes the Grand Jury and answered to their names, and by their Foreman returned into open court the following indictment, which was endorsed A True Bill, signed by the Foreman, and delivered to the Court in the presence of the Grand Jury, and ordered to be filed and placed upon this court's docket for trial.

Laurel Circuit Court, February Term, 1904.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, JOE NEWLAND, Defendants.

Indictment.

The Grand Jury of Laurel County, in the name and by the authority of the Commonwealth of Kentucky, accuse Joe Newland and the Adams Express Company, the latter being a company and part-

nership engaged in and doing business as a carrier under the firm name and style of "Adams Express Company," of the offense
3 of unlawfully selling, giving, loaning, procuring for and furnishing intoxicating, spirituous, vinous and malt liquors and a mixture thereof, committed in manner and form as follows, viz:

The said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares and merchandise, by the method known as express, the individuals comprising said firm and partnership company are to the Grand Jury unknown, but some or all of them are non-residents of this State, did in Laurel county, Kentucky, on the 17th day of February, 1904, unlawfully and wilfully carry for and deliver to George Meece a parcel, package, shipment and quantity of intoxicating, spirituous, vinous and malt liquors, and a mixture thereof, less than five gallons, to be and which was paid for on delivery at East Bernstadt in said Laurel county, same being at the time a shipment commonly known and called C. O. D. Shipments, in violation of the provisions of an Act of the General Assembly of the Commonwealth of Kentucky, prohibiting the sale of intoxicating, spirituous, vinous and malt liquors and mixtures thereof in quantities less than twenty gallons, in
4 the counties of Laurel, Rockcastle, Jackson, Owsley and Clay, approved April 4th, 1884, and in violation of the provisions of an Act approved March 10th, 1894, and in violation of the provisions of an Act approved March 11th, 1902, said acts being known as the Local Option Law, and being in full force and effect in Laurel county at the aforesaid place of East Bernstadt, the place of delivery aforesaid.

The said George Meece at the time paid to the said Joe Newland the money for said liquor and shipment, the said Joe Newland being at the time that he accepted pay for and delivered same, acting for said Adams Express Company as agent, and in charge and control of the office of said Adams Express Company at East Bernstadt in said county, said shipment and delivery being made and done at the time by said Joe Newland and Adams Express Company in the usual course of business of said Adams Express Company. The place from which said shipment was made as aforesaid, the name of the owner of said liquor and shipment, for whom same was carried and delivered as aforesaid, are unknown to this Grand Jury, the same was a place other than East Bernstadt, Laurel County, Kentucky.

5 Against the peace and dignity of the Commonwealth of Kentucky.

WM. LEWIS,
Commonwealth's Attorney, 27th Judicial District of Kentucky.

Which indictment is endorsed as follows:

A true bill.

T. G. MORAN, *Foreman.*

Received from the hands of the Foreman of the Grand Jury, in the presence of the Grand Jury, and filed in open court February 17, 1904.

G. W. SMITH, *Clerk.*

Laurel Circuit Court, May Term, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Indictment.

Upon the calling of this case for trial the Commonwealth announced ready. Thereupon the defendant, Express Com-
6 pany, moved the court to quash the summons on it herein, because same was not executed on the proper officer nearest the county seat.

The court overruled said motion, to which ruling the defendant at the time objected and excepted, and still excepts.

Thereupon the defendant demurred to the indictments, which demurrer was overruled by the court, to which ruling the defendant at the time objected and excepted, and still excepts.

Thereupon the defendant moved the court to require the plaintiff to elect which of the acts set out in the indictment it will prosecute under, to-wit: Act of 1884, or the Act of 1894 and the Act of 1902, amendment thereto, which motion the court overruled, to which ruling the defendant at the time objected and excepted, and still excepts.

The plaintiff by its attorney dismissed the case against Joe Newland.

Thereupon the defendant Adams Express Company entered a plea of not guilty; then came the following jury to-wit: D. N. Covington, Fred Mason, Sherman Smith, Lee Miller, G. G. Cox, Jas. H. Chestnut, H. C. Riggs, William Taylor, F. R. Brock, Jno. Prewitt, L. F. Hibbard and C. A. Lickliter, who were duly sworn
7 to well and truly try the issue joined, and a true verdict render.

Thereupon the Commonwealth introduced its evidence, which is as follows: (See copy of stenographer's notes hereto attached, which is made a part hereof).

At the close of the Commonwealth evidence, the defendant moved the court to give the jury peremptory instructions to find the defendant not guilty, which motion was overruled by the court, to which ruling the defendant at the time objected and excepted, and still excepts.

The defendant offered no evidence, but moved the court to give the jury the following instructions, to-wit:

I.

The court says to the jury that spirituous, vinous and malt liquors are articles of and subject of commerce same as other articles of merchandise; that the Adams Express Company is a common carrier, and as such common carrier, is bound to receive merchandise, including spirituous, vinous or malt liquors, tendered it in
8 another State for transportation into this State as articles of commerce, and especially where the express charges are paid by the consignor on the delivery of such goods for transportation, and it is required to deliver said articles and packages to the consignee at its destination, and it cannot discriminate against liquor as commerce, or to refuse to carry it from one State to another.

II.

Therefore the court says to the jury that if they believe from the evidence that the defendant, Adams Express Company, received from Crigler & Crigler, of Cincinnati, Ohio, the package directed to the witness George Meece, in its regular course of business, and that the charges were pre-paid by the consignor in the city of Cincinnati, Ohio, to be shipped by express to said witness at East Bernstadt, Kentucky, C. O. D., and that said package was in its regular course of business shipped to East Bernstadt and delivered to the witness George Meece by the agent of the defendant at East Bernstadt, Kentucky, that as applied to said shipment the Act and the Acts of the General Assembly of Kentucky, known as the Local Option Law, under which this defendant was indicted, is in conflict with and in contravention of the Interstate Commerce
9 Clause of the Constitution of the United States, and the laws regulating same, are therefore void, and you will find the defendant not guilty.

III.

The court instructs the jury that if they believe from the evidence that the package delivered to the witness, George Meece, was delivered to the Adams Express Company, charges pre-paid, in the city of Cincinnati, State of Ohio, in its regular course of business, for shipment to East Bernstadt, Laurel county, Kentucky, Collect on Delivery, and was there delivered by the said Express Company to the consignee, George Meece, and the C. O. D. charges thereon collected, and transmitted by the said Express Company or its agent to the consignor at Cincinnati, Ohio, that the jury must find the defendant not guilty, although the package contained whiskey or other intoxicating liquors.

Which motion and instructions the court overruled and refused to give, to which ruling of the court the defendant at the time objected and excepted, and still excepts.

10 Thereupon the court gave the following instructions, to-wit: Nos. 1, 2 & 3.

I.

GENTLEMEN OF THE JURY:

If you shall believe from the evidence beyond a reasonable doubt that the defendant, Adams Express Company, is a co-partnership, formed of persons whose names and number were unknown to the Grand Jury that found this indictment, and who lived out of the State of Kentucky, but are doing business in the State of Kentucky, and in Laurel County, Kentucky, and under the firm name and style of "Adams Express Company," and that the said Adams Express Company, in this county, and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous or malt liquors in quantities of less than five gallons, at the time mentioned by the witness, and received the pay therefor, and that said company received any pay whatever for its service in that behalf, then you should find the defendant guilty, and fix its punishment at any fine not less than $60.00 nor more than $100.00 in your discretion, according to proof.

11 II.

The court says to the jury that if they shall believe from the evidence beyond a reasonable doubt that the agent or agents of the defendant's company that accepted, received, transported or delivered the package mentioned in evidence by the witness, Meece, knew, or might by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transactions of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge, and should be held to know the contents of such package.

III.

If you have a reasonable doubt from the evidence of the defendant having been proven guilty, you will find it not guilty.

To each and all of the foregoing instructions, given by the court to the jury, the defendant at the time objected and excepted, and still excepts.

The jury, after hearing the evidence and instructions of the court, retired to consider their verdict, and returned to open court the following verdict, to-wit:

12 We, the jury, agree and find the defendant guilty as charged in the indictment, and fix the fine at $60.00.

D. N. COVINGTON, *Foreman.*

Thereupon the court rendered the following judgment against the defendant in the sum of $60.00, to which defendant objected and excepted, and still excepts.

Laurel Circuit Court, May Term, May 20th, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS — & JOE NEWLAND, Defendants.

Order and Judgment.

This cause came on for trial. The defendants moved to quash the summons against the Adams Express Company.

Court being advised, overruled said motion, and the defendants object and except. The defendants demurred to the indictment. Court being advised, overruled said demurrer, to which defendants objected. Defendants moved the court to require the plaintiffs to elect under which Act plaintiff would prosecute.

13 Court overruled said motion, to which defendants excepted.

On motion of the Commonwealth, this cause is dismissed as to defendant Joe Newland.

Thereupon the court upon its own motion called the service of the official court reporter to report the proof in this case in short hand.

Thereupon came the following jury, to-wit: D. N. Covington, Fred Mason, Sherman Smith, Lee Miller, G. G. Cox, Jas. H. Chestnut, H. C. Riggs, William Taylor, F. R. Brock, Jno. W. Prewitt, L. F. Hibbard, C. A. Lickliter, who were duly sworn to well and truly try the issue joined herein, and to render a true verdict.

After hearing the evidence and instructions of the court, returned the following verdict:

We, the jury, agree and find the defendant guilty as charged in the indictment, and fix the fine at $60.00 (sixty dollars).

D. N. COVINGTON, *Foreman.*

It is therefore adjudged by the court that the plaintiff recover of the defendant the sum of sixty dollars with the cost herein expended.

14 That *on* the May term, May 23rd, 1904, the defendant came into court and filed its written motion and grounds for a new trial, which was submitted to the court, which is in words and figures as follows:

Laurel Circuit Court.

195.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Motion & Grounds for New Trial on Ind'c't.

The defendant, Adams Express Company, comes and moves the court to set aside the verdict of the jury and judgment of the court

in this case rendered at this term, and grant it a new trial in said case, for the following reasons:

1st. Because the court misinstructed the jury, and refused to properly instruct the jury, and because the court refused to give the law and instructions as offered by the defendant.

2nd. Because the verdict of the jury and judgment of the court are not supported by and is contrary to the law and evidence.

15 3rd. Because the court allowed incompetent evidence to go to the jury over the objections and exceptions of the defendant.

ADAMS EXPRESS COMPANY,
By W. L. BROWN, *Att'y.*

Laurel Circuit Court, May Term, May 23rd, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Order Filing Motion and Grounds.

On this day came the defendant and produced and filed motion and grounds for a new trial in this case, and this cause was submitted on said motion.

Laurel Circuit Court, May Term, June 2nd, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Order Overruling Motion & Grounds for New Trial.

16 This cause being on submission of defendant's motion and grounds for a new trial herein, and the court having considered said motion, and being advised, orders and adjudges that said motion be, and the same is, overruled, to which the defendant objects and excepts, and prays an appeal to the Court of Appeals, which is granted.

Laurel Circuit Court, May Term, June 2nd, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Order.

On motion of the defendant, Adams Express Company, it is ordered that Miss Mollie Riley, this court's official stenographer, transcribe all the testimony, together with all the objections and ex-

ceptions made on the trial of the above styled case, and make a carbon copy of same.

It is ordered that one of said copies, when properly certified, and approved by the Judge of the court, make and compose a part of the Bill of Exceptions for the Court of Appeals in this case, and the other be left on file in the office of the Circuit Clerk of Laurel County.

Laurel Circuit Court, May Term, June 2nd, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Order.

This day came defendant and produced and tendered its Bill of Exceptions in this case, which was approved and signed by the court, and ordered to be filed and copied into the Bill of Exceptions for the Court of Appeals, but not spread at large on the Order Book of this court.

H. C. FAULKNER, *Judge.*

Supersedeas Bond.

Case # 195.

ADAMS EXPRESS COMPANY, Appellants,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Upon appeal from a judgment of the Laurel Circuit Court, rendered the *20th* day of May, 1904.

Whereas, said appellants have taken an appeal from the judgment of this court rendered on the *20th* day of May, 1904, against it in favor of appellee, fine of *$60.00* and cost for selling liquors, and the appellant- desire to supersede said judgment,

Now, we, Adams Express Company, principal, and W. L. Brown and Wm. T. Hayward, surety, do hereby covenant to and with the appellee Commonwealth of Kentucky that the appellant will pay to the appellee all costs and damage that shall be adjudged against the appellant on the appeal, also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding the amount or value — the judgment aforesaid, and also pay all rent, hire, or damage, which, during the pendency of the appeal, may ac-

crue on any part of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands, this 2nd day of June, 1904.

ADAMS EXPRESS CO.,
By WM. HAYWARD, *Agent.*
W. L. BROWN.
WM. HAYWARD.

Attest:
GEO. W. SMITH, *Clerk.*

Filed 2nd day of June, 1904.

GEO. W. SMITH, *Clerk.*

STATE OF KENTUCKY, *County of Laurel, sct:*

I, Geo. W. Smith, Clerk of the Laurel Circuit Court, do certify that the foregoing Bill of Exceptions contains a true and complete copy of said bill and records of the court in this case, including a copy of the evidence made by Miss Mollie Riley, this court's stenographer, per order of court, which is attached hereto as part hereof.

Given under my hand this 17th day of June, 1904.

GEO. W. SMITH,
Clerk of the Laurel Circuit Court.

20 Laurel Circuit Court.

Case # 195.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE ADAMS EXPRESS COMPANY, Defendant.

Transcript of Testimony.

Upon the calling of this case, the defendant pleads not guilty, the jury were sworn, and the indictment read and the case stated by the attorney for the Commonwealth.

GEORGE MEECE was called as the first witness by the Commonwealth; after being sworn, he testified as follows:

1. Mr. Meece, were you before the grand jury of this court at the February term, 1904?
A. Yes, sir.
2. Before that time did you get any whiskey in this county?
A. Yes, sir.
3. Within less than twelve months before the February term of this court, 1904?
A. Yes, sir.
4. What amount did you get?

A. One gallon.
21 5. Where did you get it?
A. At East Bernstadt Express Office.
6. Is that in Laurel county?
A. Yes, sir.
7. Did you pay for the whiskey?
A. Yes, sir.
8. What amount did you pay?
A. Three dollars and eighty-five cents.
9. To whom did you make that payment?
A. Joe Newland, the Express Agent.
10. For whom is Mr. Newland Express Agent?
A. I don't know.
11. How did the whiskey come there to East Bernstadt?
A. C. O. D.
12. Where did you get the package from?
A. From the Express Agent at East Bernstadt.
13. Do you know where the whiskey came from?
A. No, sir, I don't know positively.

Cross-examination:

14. Is this the same whiskey you testified about to-day buying from Crigler & Crigler?
A. I am testifying the one time.
22 15. Didn't you testify you bought several times?
A. I bought brandy three times and whiskey once.
16. Didn't you testify you got that whiskey you testified about to-day from Crigler & Crigler?
A. I said to the best of my judgment that was where it came from.
17. Didn't you testify that was the same whiskey you bought from Crigler & Crigler that you got from the agent?

(Plaintiff's objections overruled.)

A. I don't remember.
18. Did you get any other whiskey you have testified about from the Adams Express Company, except that shipped from Crigler & Crigler?
A. I can't say whether I did or not.
19. Can you say you ever got any whiskey or liquor from Adams Express Company, except such liquors as was shipped by Crigler & Crigler from Cincinnati, Ohio, C. O. D.?
A. I don't know.
20. Do you know who the Adams Express Company is?
A. No.
21. Do you know that Joe Newland is their agent?
A. He says he is.
23 22. What is the Express Company?
A. I have no idea.
23. You don't know whether or not they ever got a cent of that money, do you?
A. I paid it to the agent.

24. For what purpose did you pay it to the agent?
A. For the express package that was there for me.
25. Didn't you pay it to the agent for Mr. Crigler & Crigler for whiskey from Cincinnati, Ohio?
A. I paid him, and I didn't care what he done with the money.
26. Wasn't that the purpose for which you paid him for it?
A. I paid him for the whiskey.
27. Did you pay it for the Express Company?
A. No, for Crigler & Crigler.

Re-examination:

28. How did you find out that whiskey was there?
A. The first I knowed it was there, I went in with my brother, and he asked if there was a package there for him, and while looking over the books, Newland said there was one there for George Meece; I told him I couldn't take it then, but would take it next Saturday, which I did.
24 29. You don't know personally from whom this whiskey was shipped?
A. No, sir.
30. Do you know anything about whether the Adams Express Company received that shipment of whiskey in Cincinnati or not?
A. No.
31. Did you make any order for that whiskey?
A. No.
32. Did you authorize or direct any one else to make an order for that whiskey?
A. No, not for the first.

Recross-examination:

33. You then never got any whiskey but the one time, you didn't order from Crigler & Crigler?
A. I got it the one time.
34. That is the same whiskey you swore about and testified against Crigler & Crigler for selling you?
A. They didn't sell it to me.
35. Didn't you testify against them to-day?
A. It is supposed to come from them.
36. Didn't you testify it came from them?
A. They didn't sell it to me.
25 37. You testified that they sold it to you, didn't you?
A. No, sir.
38. You stated it was shipped from Cincinnati to you?
A. I suppose so.
39. That is the only package of whiskey you got from Crigler & Crigler you didn't order?
A. No, sir, I don't think it is.
40. When did you get another that you didn't order?
A. I can't remember, I got two or three I didn't order.
41. When did you get these packages?
A. I don't know.

42. About when did you get these packages you have testified about getting from the Adams Express Company?

A. I got one package about the 24th of December last.

43. That is the same whiskey you testified about when you testified against Crigler & Crigler?

A. It may have been the second or third one, I don't remember.

44. Didn't you swear to-day that you had never got but one package of whiskey you didn't order from Crigler & Crigler?

A. I swore I got one.

45. Is that the one?

A. No.

26 46. Which one?

A. It has been since that, I got them.

47. When did you get them?

A. I got one in December, I don't remember about the others.

48. Well, is that the one you are testifying about now?

A. That is not the one I testified about this morning.

49. You got one in December, now when did you get the others?

A. I think I got some in November.

50. Then in December you say you got the whiskey you didn't order?

A. I never ordered any of it. I never did order any of it.

51. Didn't you direct D. C. Adams to send for it, for you?

A. Yes, sir, after I got about three boxes.

52. Didn't you swear in the case of the Commonwealth against Crigler & Crigler that you didn't get but one package, but that which you had directed D. C. Adams to order for you from Crigler & Crigler?

A. I don't remember testifying to any such thing.

53. Didn't the package you got on the twenty-fourth day of December, have the number of the street from which it was shipped in Cincinnati?

A. I never noticed it.

27 JOE NEWLAND was the next witness called by the Commonwealth; after being sworn, he testified as follows:

1. Mr. Newland, were you before the grand jury of this court at its February term, 1904?

A. Yes, sir.

2. Do you know the witness, George Meece?

A. Yes, sir.

3. What business were you engaged in on February 17, 1904, and prior to that time, for several months?

A. Agent for the Railroad Company and Adams Express Company.

4. Where were you located?

A. East Bernstadt.

5. How long had you been located at East Bernstadt, prior to the February term of this court, 1904, as agent of the Adams Express Company?

A. I think since June, 1903.

6. State to the jury whether or not as agent of the Adams Express Company, at any time while you were in East Bernstadt, Laurel county, Kentucky, you delivered any shipments or packages of whiskey to the witness, George Meece?

A. I delivered a package to him, but I don't know whether or not it was whiskey.

28 7. When did you deliver that package of whiskey?

A. I think it was some time in December.

8. How did that package come there at the depot in East Bernstadt?

A. It came by express.

9. What express?

A. Adams Express.

10. Did Mr. Meece pay any charges on that package?

A. Yes, sir.

11. What did he pay?

A. Three dollars and eighty-five cents.

12. To whom did he pay that?

A. To me.

13. And what did you do with it?

A. I put it in an envelope and sent it to the shippers in Cincinnati.

14. What kind of a shipment was that?

A. It was a box?

15. Describe that box to the jury, Mr. Newland?

A. Well, it would weigh about fifteen pounds, I guess, and was about a foot square at the end, and a little longer than that.

29 16. Had you seen before that time any other package like that one, there in the depot at East Bernstadt?

(Objections overruled, defendant excepts.)

A. I have seen packages that look like it, yes, sir.

17. How many such packages have you seen there, prior to the 17th day of February, 1904, that looked to be such packages as the one you delivered to Mr. Meece?

(Objections overruled, defendant excepts.)

A. I don't know how many, I expect something like a hundred.

18. During the time you have been there, you have seen something like a hundred packages, like this one?

A. Yes, sir, something like a hundred packages.

19. How many such packages had you seen there in the depot, prior to the date on which you delivered to George Meece the package he got?

A. I don't know.

(Objections overruled, defendant excepts.)

20. Well, about how many?

A. About seventy-five or something like that.

21. Did you ever see any of these packages taken out of the depot office and opened?

(Objections overruled, defendant excepts.)

30 A. I have seen packages like that after they were opened. I never saw them opened.

22. What was in them packages, like the one you delivered to George Meece, that you say you saw after it had been opened?

(Objections overruled, defendant excepts.)

A. Four quart bottles.

23. What was contained in these bottles?

A. I don't know.

24. Was there anything in them?

A. Yes, there was something in them.

25. Were these bottles labeled?

A. Yes, sir.

26. What was on the label?

A. Some were labeled "whiskey," and some "brandy."

27. Did you know at that time what business Messrs. Crigler & Crigler were engaged in?

(Objections overruled, defendant excepts.)

A. I know what they were supposed to be engaged in.

28. Did you have any information as to what business they were engaged in at that time?

(Objections overruled, defendant excepts.)

A. No, sir, I didn't have anything to show what they were engaged in.

31 29. Did you have any knowledge at all, on that subject, as to what they were engaged in?

A. Who?

30. Crigler & Crigler.

(Objections overruled, defendant excepts.)

A. I just said, I knew what they were supposed to be engaged in.

31. What were they supposed to be engaged in?

(Objections overruled, defendant excepts.)

A. Selling whiskey and brandy.

32. Is it not a fact that you were aware, or at least fully satisfied, that these packages of which you speak of having been shipped there to that office, prior to the date on which you delivered that shipment to Mr. Meece, contained whiskey or brandy?

(Objections overruled, defendant excepts.)

A. I was satisfied that was what they contained.

33. Wasn't you fully satisfied also, that the shipment you delivered to George Meece, was a package of whiskey or brandy?

A. I thought it was, yes, Sir.

34. During the time you have been engaged there and were en-

gaged prior to the date on which you delivered the shipment
32 to Mr. Meece, were there not other packages from Crigler & Crigler on which the C. O. D. charges were three dollars and eighty-five cents?

(Objections overruled, defendant excepts.)

A. Yes, sir.

35. Were there any such packages on which the C. O. D. charges were three dollars and eighty-five cents, except those that contained whiskey or brandy?

A. There were some of them that I don't know what they contained and some I saw after they were opened.

36. Were there any such packages as were opened on which the C. O. D. charges were three dollars and eighty-five cents, except those containing whiskey or brandy?

A. None that I know of.

37. How long have you been connected with the defendant, Adams Express Company, as agent for them?

A. At East Bernstadt?

38. Any where?

A. I have only been agent since last June, but I had worked for them before that several times.

39. Does the Adams Express Company have their own cars,
33 in which their C. O. D. packages are shipped?

A. I don't know.

40. Is there any brand, or printed matter on the cars in which the express packages are shipped, by which you could identify the express cars from the other boxes?

A. No, Sir, they all have "Louisville & Nashville Railroad Company" on them.

41. Is there any coach or car that has printed on it "Adams Express Company"?

A. I have never seen any.

42. Do you know who constitutes the members of the firm of the Adams Express Company?

A. No, Sir.

43. Do you know where their principal place of business is located?

A. Do you mean the main office?

44. Yes, their home office.

A. I think it is in New York.

45. Do you know who the President of the Company is?

A. No, Sir, I don't remember.

46. Have you any thing by which you can tell who the President and Secretary are, and who the General Managers are?

34 A. I hav-n't any thing with me. I know who the Superintendent of this Division is.

47. Who?

A. Mr. K. Sanford, Cincinnati, Ohio.

48. Is that the place from where these various packages and the package you delivered to Mr. Meece came from?

A. Yes, Sir.

Thereupon came the attorney for the Commonwealth and offered to read to the jury a certified copy of the annual report of the Adams Express Company, made to the Secretary of State, of the State of New York, pursuant to the laws of New York, which appears to be certified by Horace G. Tennant, Second Deputy Secretary of State, with the Seal of the State of New York attached and the signature of the said Horace G. Tennant certified by John F. O'Brien, Secretary of State, of the State of New York, under the Seal of said State, and the Court being advised, is of opinion that this evidence is competent, and allows the Attorney for the Commonwealth to read, or have read, said report to the jury, to which the defendant objects and excepts.

35 UNITED STATES OF AMERICA, *State of New York:*

By John F. O'Brien, Secretary of State and Custodian of the Great Seal Thereof.

It is hereby certified, That Horace G. Tennant, was, on the day of the date of the annexed Certificate and Attestation, Second Deputy Secretary of State, of the State of New York, and duly authorized by the laws of said State to make such Attestation and Certificate, and to perform the duties belonging to the Secretary of State in making such Attestation and Certificate, in like manner as said Secretary of State; that the said Certificate and Attestation are in due form and executed by the proper officer; that the seal affixed to said Certificate and Attestation is the Seal of office of the Secretary of State, of the State of New York; that the Signature thereto of the said Second Deputy Secretary of State is in his own proper handwriting, and is genuine; and that full faith and credit may, and ought to be, given to his official acts; and, further, that
36 the Secretary of State is the Custodian of the Annual Report so certified and attested, and Custodian of the Great Seal of said State hereto affixed.

[SEAL.] In Testimony Whereof, The Great Seal of the State is hereunto affixed.

Witness my hand at the City of Albany, the ninth day of May, in the year of our Lord one thousand, nine hundred and four.

JOHN F. O'BRIEN,
Secretary of State.

Report of The Adams Express Company Made Pursuant to Provisions of Chapter 235, Laws of 1894.

59 BROADWAY, NEW YORK, *January* 31, 1904.

To the Secretary of State of the State of New York:

Agreeably to law, as President and Treasurer of the above Company, we hereby certify that the name of this Association is The Adams Express Company; that such Association was organized under the common law, as a co-partnership, on the first day of July, 1854;

that the latest reported (December 1st, 1902) numbers of
37 copartners, or shareholders, in such Association is 2940; that the names and places of residence of its Managers are:

Levi C. Weir, of Cincinnati, in the State of Ohio.
William B. Dinsmore, of New York, in the State of New York.
William H. Damsel, of Chicago, in the State of Illinois.
William M. Barrett, of Philadelphia, in the State of Pennsylvania.
Caleb S. Spencer, of Newton, in the State of Massachusetts.
Charles Steele, of New York, in the State of New York.
Basil W. Rowe, of Cincinnati, in the State of Ohio.

That Levi C. Weir, of Cincinnati, Ohio, is its President, that William H. Damsel, of Chicago, in the State of Illinois, is its Vice-President, that Horatio H. Gates, of the City and State of New York, is its Secretary, and that Basil W. Rowe, of Cincinnati, in the State of Ohio, is its Treasurer, and that its principal place of business is in the City, County and State of New York.

LEVI C. WEIR, *President.*
BASIL W. ROWE, *Treasurer.*

38 STATE OF NEW YORK, *County of New York, ss:*

On this 8th day of March, 1904, before me personally, came Levi C. Weir and Basil W. Rowe, known to me to be the President and Treasurer of the Adams Express Company, and they were by me severally duly sworn, and they did thereupon severally and each for himself depose and say that the matters and things in the foregoing certificate stated, were true to the best of his knowledge, information and belief.

LEVI C. WEIR, *President.*
BASIL W. ROWE, *Treasurer.*

Sworn to, and subscribed before me, the day and year aforesaid.
[SEAL.] JOHN J. DALY,
Notary Public, Kings County.

Certificate in New York County.

(Endorsed:) Adams Express Company. Annual Report, Pursuant to Chapter 235, Laws of 1894.

39 STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE.

Filed and recorded, March 11, 1904.

J. B. H. MONGIN,
Deputy Secretary of State.

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding, with the Annual Report of The Adams Express Company, filed in this office on the 11th day of March, 1904, and I do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

Witness my hand and the Seal of office of the Secretary of State, at the City of Albany, this ninth day of May, one thousand, nine hundred and four.

[SEAL.] HORACE G. TENNANT,
Second Deputy Secretary of State.

40 Cross-examination:

49. You say you are the agent of the Adams Express Company, at East Bernstadt?

A. Yes, Sir.

50. What business is the Adams Express Company engaged in?

A. That of a common carrier.

51. What do they do?

A. Carry express packages from different people to different places.

52. I will ask you, if as a common carrier, they are not engaged in the transportation of commerce from one point to another, and from one State to another, throughout the United States?

A. Yes, sir.

53. You say you have been at East Bernstadt, since when?

A. Since June, 1903, I think.

54. Do you know whether or not the Adams Express Company had any knowledge—its President, Superintendent and General Manager—as to what was contained in the packages, that you say was shipped from Cincinnati, Ohio, to East Bernstadt, Kentucky?

41 A. I don't know as they did.

55. Was there anything on the boxes to indicate what was contained in said packages?

A. No, sir.

56. Could the agent of the Adams Express Company, in the City of Cincinnati, have looked at that package and told from its outside appearance, whether it contained sugar, coffee, or what else?

A. No, sir, he could not. I could not.

57. Where was that package received and shipped from?

A. Cincinnati, Ohio.

58. In another State?

A. Yes, sir.

59. And shipped over what line of railroad?

A. Over the Kentucky Central and the L. & N.

60. To what point over the Kentucky Central?

A. Over that Divison to Livingston, and over the Knoxville Division, to East Bernstadt.

61. You were asked if the Adams Express Company had any car, or cars, marked "Adams Express Company?"

A. Lots of things are marked "Adams Express Company"

42 and they may have cars, but I have never seen any.

62. Is it not a fact on the cars containing the express, which is received at your depot, are marked "Adams Express Company" or "Express Company?"

A. I don't remember it, if it is.

63. Is it not a fact that on one end of the car is marked, "Adams Express Company?"

A. I have never seen it.

64. I will ask you if there is not a division in that car, and if the other end of the car is not marked "Baggage?"

A. There are three compartments in the car generally, and the only mark that I can remember seeing is the mail car, and it is marked, "United States Railroad Post Office."

65. Don't you know it is a fact that the car in which there is express and in which the express agent stays, is marked "Express?"

A. I don't think it is.

66. When did you receive that package at East Bernstadt?

A. I could not say the date, so many of them come. It might have been in November or December. I think I delivered it in December.

43 67. You delivered it, you say, in December?

A. I think it was.

68. How much did you collect on that package?

A. Three dollars and eighty-five cents.

69. Did you pay any of that money to the Adams Express Company?

A. No, sir.

70. I will ask you if it is not a fact that every cent that you received from Mr. Meece on that package, was put up in a sealed envelope and sent to Crigler & Crigler, Cincinnati, Ohio?

A. Yes, sir, it was.

71. Is it not a fact that you, as agent of the Adams Express Company, reported to the company you had not received one cent for the use and benefit of the Adams Express Company?

A. Don't any of it go to the Adams Express Company.

72. Don't you know, as agent of the Adams Express Company, that the Adams Express Company, had no interest, directly or indirectly, in that package, its contents, or the money you received for it, and delivered to the witness, George Meece, except as a common carrier to deliver it and collect the money for Messrs. Crigler &

44 Crigler of Cincinnati, Ohio?

A. That's all I know about it, none of the money I collected went to the Express Company.

73. I will ask you if it is not a fact that before this package was received by the Adams Express Company, that the charges for transporting same were paid to the Adams Express Company in Cincinnati, Ohio, for the transportation of this package from Crigler & Crigler to deliver it to East Bernstadt, to George Meece?

A. Yes, sir, it was prepaid.

74. In the regular course of the business of the Adams Express Company, I will ask you if it is not their duty to receive and transport any package that may be delivered to them for transportation to any point to which it is consigned, whenever the person tenders the pay for the transportaion of the same?

(Objections sustained, defendant excepts.)

75. I will ask you if it is not a common thing in the regular course of business of the Adams Express Company, for packages to be sent to your office, and to other points, on which you can't tell what is contained in the packages, and the charges prepaid by the sender?

45 A. Yes, sir.

76. And sent to your office C. O. D.?

A. Yes, sir.

77. Was there a bill sent to you in connection with this package, prepaid from Cincinnati?

A. The express bill was on it.

78. Was there anything on the express bill, or the bill of lading, that indicated, or that one could tell by looking at it, as to what was contained in the package so shipped?

A. No, sir, not on the bill I got, there was not.

79. Do you know that all the packages that you say was in boxes the same shape and size, received at your office by the Adams Express Company, contained brandy or whiskey?

A. No, sir.

80. Has there not other packages been received there about the same size and dimensions, as these you speak of, that contained, possibly other things, patent medicines, &c.?

A. Yes, sir.

81. That would be shipped C. O. D.?

A. Yes, sir.

82. Is it not a fact that very often you receive packages
46 about the same shape and dimensions, containing patent medicines and other medicines, that you could not tell from the outside what they did contain, until opened?

A. Yes, sir, I have seen them you could not tell what was in them, and about the same kind.

83. Is it not a fact that you have received packages about the same size and dimensions, not marked on the outside, that you could not tell what was contained, that did contain something other than whiskey, after being opened?

A. Yes, sir.

84. I will ask you if it is not a fact that the Express Company, or the route agent, having charge of the express, does not have control of one of the compartments of these cars, away from the other people on the train?

A. Yes, sir.

85. And in that car there are compartments, and the express received for transportaion is placed in the care and control of the route agent?

A. Yes, sir, the express messenger.

Re-examination:

86. Is the express messenger who has charge of the car in
47 which is carried the express packages, an agent of the Adams Express Company?

A. Yes, sir.

87. You speak of receiving boxes or packages similar in size to those shipped from Crigler & Crigler of Cincinnati, which had patent medicine in them; I will ask you if you ever saw any one make an examination and open one of them and find patent medicine in it, instead of whiskey?

(Objection overruled, defendant excepts.)

A. No, sir, I never.

88. Did you ever receive a box of patent medicine of that size on which the C. O. D. charges were three dollars and eighty-five cents?

A. Not as I remember of.

89. Did you at any time while you were engaged as agent of the Adams Express Company at that place and while these shipments were coming from Cincinnati, Ohio, from Crigler & Crigler, ever believed that any of them contained patent medicine?

(Objection overruled, defendant excepts.)

A. No, sir, I don't believe they did. I don't know what they contained.

48 90. Mr. Newland, is it not the custom of the Adams Express Company to make certain charges for the shipment and transportation of all express packages?

A. Yes, sir.

91. In other words, they were not shipping these packages as a matter of accommodation?

A. No, sir.

92. About what was the express charges on the express package which Mr. Meece received at East Bernstadt?

A. Not any charges on it there, it was prepaid. It was about fifty cents, I think.

93. Do you know who prepaid these express charges?

A. There is most always a note on the bill saying who prepaid it.

94. Was there a note on that bill saying who prepaid it?

A. I could not say, about that particular bill.

95. Do you know who prepaid the charges on that particular package?

A. The shipper, I suppose.

96. Does the Adams Express Company keep a record of the charges on express packages?

49 A. Yes, sir.

97. Did you keep one for the company, in East Bernstadt, and did you do so at the time this shipment was delivered to Mr. Meece?

A. Yes, sir.

98. Mr. Newland, does the Adams Express Company make the same rate of charges on all articles sent by express, or is there a difference in this rate?

A. Difference in some things, yes, sir.

99. How do they determine how to fix the rate unless they know what they are shipping?

A. I don't know.

100. Is it not a fact they do know and have to know what is being shipped, in order to fix the rate?

A. Not necessarily, no. Some things go by the bulk of the article, and other things they give pound rates, some things are taken at a merchandise rate.

101. How is whiskey taken, at what rate?

A. If it is samples, I think they get a lower rate than if not shipped as samples, but I think it is shipped at merchandise rate.

50 101. What is the rate when it is not shipped as samples?

A. Sample rates is about twenty per cent. less than merchandise rates, they ship at merchandise rates where they don't give them sample rates.

103. Now Mr. Newland, if I understand you, where it is not shipped for sample purposes, it goes at merchandise rates?

A. Yes, sir.

104. Would there be any difference in the rates by express, of bottled whiskey and the rate of shipping a suit of clothes by express?

A. It is according to what you are shipping it for. Do you mean the common merchandise rate?

105. I am speaking of samples, what I want to know is, would the rate of express charges be the same for shipping a box of bottled whiskey, as it would be for shipping and transporting a suit of clothes?

A. Yes, sir, I think so.

106. Are you sure?

A. I think so.

107. Is there any difference in the rate of express charges?

A. None, only as I have told you.

51 108. Do you have the same rate for bottled goods as you do for clothes, or things less liable to breakage?

A. Not all the time, some bottled goods, if they are prepaid, you get a lower rate.

109. Does the Company make the same rate whether it is prepaid or not prepaid?

A. No, there is a difference.

110. Which is the most?

A. Where they come collect, on that kind of a package.

11. Did the Company charge any express charges for this particular package in this case—did they charge for the delivery of it, or did they do it free?

A. They charged express, but it was prepaid, we didn't charge anything at East Bernstadt, but it was paid in Cincinnati.

112. Oh well then, there was a charge on it?

A. Yes, sir.

Recross-examination:

113. The merchandise rate is all the same for merchandise?
A. Yes, sir.
114. Whether it be whiskey, molasses, coffee, sugar, or any
52 kind of merchandise goods, at the same rate as anything else by the pound as ordinary merchandise?
A. There is a difference in some of that, some of it if you prepay it——
115. I mean the ordinary merchandise rate?
A. Yes, sir.
116. And when the charges are prepaid it is generally less than when it is sent collect?
A. Yes, sir.
117. On some things then—you say on sample whiskey—there is twenty per cent. off?
A. Yes, sir.
118. I will ask you if on all merchandise shipped as samples there is not a lower rate than on ordinary shipments?
A. Yes, sir, a pound rate is what they usually get.
119. When they are shipped at merchandise rate it is not necessary for you to know whether it is molasses, whiskey, sugar, coffee, or what the contents of the boxes are, on merchandise rate?
A. No, sir, not necessarily so.
120. And in sample rates you do know what the samples contain, and you give a lower rate?
53 A. Yes, sir, it is stenciled, or marked.
121. Showing what the package contains?
A. Yes, sir.
122. When a man ships a good deal of anything does he not get special rates?
A. Yes, sir.
123. Is there not special rates given to large shippers on the railroad and by the Express Company, such as coal and things of that kind?
A. Yes, sir.
124. So they make special rates to any business where there is a large amount being shipped over the line by express?
A. Yes, sir.
125. The bill that you received, you say didn't show from whom it was shipped—this package we have been speaking about?
A. I don't know whether that one did or not.
126. Is there not a bill that goes along with the package, showing the amount of charges to be collected, and showing from whom the goods are shipped?
A. Do you mean C. O. D.?
127. Yes.
54 A. Yes, sir.
128. That bill always shows who the consignee is?
A. Yes, sir.
129. And also shows how much is to be collected, and to whom to return it?

A. Yes, sir.

130. And the number of the street, if they have any?

A. Yes, sir.

131. And in this case, these charges you received, you returned to the street and to the parties that the bill indicated had shipped these goods to Mr. Meece?

A. Yes, sir.

132. I will ask you if whiskey is not included as merchandise?

A. Yes, sir.

133. I will ask you if whiskey is not included as merchandise and shipped over the road the same as other merchandise?

A. Some is and some is not.

134. What is?

A. It is just like I said a while ago, if it is prepaid they get a little lower rate, and sample whiskey comes lower still.

55 135. Didn't you state awhile ago, that the prepaid rate on any merchandise is lower than the regular rate, if it is samples of any merchandise?

A. Yes, sir.

JACOB L. CRIGLER, was the next witness called for the commonwealth, after being sworn he testified as follows:

1. Is your name Jacob L. Crigler?

A. Yes, sir.

2. Mr. Crigler, are you acquainted with Basil W. Rowe of Cincinnati, Ohio?

(Objection sustained, plaintiff excepts.)

The witness claims that his testifying in this case would tend to incriminate him with the cases in which he stands indicted in this Court, and he declines to testify on that ground, and the Court sustained him.

At this point came the defendant and moved the Court to instruct the jury to find for the defendant, the Court overruled said motion, to which defendant excepts.

56 Thereupon came the defendant and moved the Court to instruct the jury as set out in instructions Nos. 1, 2 & 3, offered by the defendant and this motion the Court overruled and declined to give said instructions, or any of them, and to this ruling of the Court the defendant at the time excepted.

Thereupon the Court, upon its own motion, instructed the jury in writing as set out in instructions 1, 2 & 3, and signed by the Judge of this Court. To the giving of these instructions, the defendant at the time excepted.

GENTLEMEN OF THE JURY:

If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Adams Express Company, is a co-partnership formed of persons whose names and numbers were unknown to the Grand Jury that found this indictment, and who live out of the

State of Kentucky, and doing business in Laurel County, Kentucky, and under the firm name and style of "Adams Express Company" and that the said Adams Express Company, in this County and within twelve months next before the finding of the indict-
57 ment herein, knowingly delivered to the witness, George Meece, spirituous, vinous, or malt liquors, in quantities less than five gallons, at the time mentioned by the witness and received the pay therefor, and that said Company received any pay whatever for its services in that behalf, then you should find the defendant guilty, and fix its punishment at any fine not less than $60.00 nor more than $100.00, in your discretion, according to the proof.

II.

The Court says to the jury that if they shall believe from the evidence, beyond a reasonable doubt, that the agent, or agents, of the defendant Company, that accepted, received, transported, or delivered the package mentioned in evidence by the witness, Meece, knew, or might by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transaction of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge, and should be held to know the contents of such package.

58 III.

If you have a reasonable doubt, from the evidence, of the defendant having been proven guilty, you will find it not guilty.

The following instructions were offered by the defendant and overruled by the court:

The court says to the jury that spirituous, vinous and malt liquors are articles of and are subjects of commerce same as other articles of merchandise; that the Adams Express Company is a common carrier, and as such common carrier is bound to receive merchandise, including spirituous, vinous or malt liquors, tendered it in another State for transportation into this State as articles of commerce, and especially where the express charges are prepaid by the consignor on the delivery of such goods for transportation, and it is required to deliver said articles and packages to the consignee at its destination, and it cannot discriminate against liquor as commerce, or to refuse to carry it from one State to another.

59 2. Therefore, the court says to the jury that if they believe from the evidence that the defendant, Adams Express Company, received from Crigler & Crigler of Cincinnati, Ohio, the package directed to the witness George Meece, in its regular course of business, and that the charges were paid by the consignor in the City of Cincinnati, Ohio, to be shipped by express to the said witness of East Bernstadt, Kentucky, C. O. D., and that said package was in its regular course of business, shipped to East Bernstadt, and delivered to the witness George Meece, by the agent of the defendant at East Bernstadt, Kentucky, that as applied to said shipment the act and acts of the General Assembly of Kentucky, known as the Local

Option Law, under which this defendant was indicted, is in conflict with and in contravention to the Interstate Commerce clause of the Constitution of the United States and the laws regulating same, and therefore void, and you will find the defendant not guilty.

III.

The court instructs the jury that if they believe from the evidence that the package delivered to the witness George Meece, was
60 delivered to the Adams Express Company, charges prepaid in the City of Cincinnati, State of Ohio, in its regular course of business, for shipment to East Bernstadt, Laurel county, Kentucky, Collect on Delivery, and was there delivered by said Express Company to the consignee, George Meece, and the C. O. D. charges thereon collected, and transmitted by said Express Company or its agent to the consignor at Cincinnati, Ohio, that the jury must find the defendant not guilty, although the package contained whiskey or other intoxicating liquors.

STATE OF KENTUCKY, *County of Laurel:*

I, Mollie Riley, Official Stenographer for Laurel county circuit court, do certify that the foregoing twenty-nine pages of typewritten matter is a true and correct transcript of all the evidence offered on the trial of the case of the Commonwealth of Kentucky against The Adams Express Company, case 195, together with the rulings of the court and his instructions to the jury.

Given under my hand this 3rd day of June, 1904.

MOLLIE RILEY,
Official Stenographer, Laurel Co., Ky.

Approved by the court.
H. C. FAULKNER, *Judge.*

Attest:
GEO. W. SMITH, *C. L. C. C.*

61 Be it remembered that on the 28th day of September, 1904, in the Court of Appeals of Kentucky at the Capitol at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS CO.
v.
COMMONWEALTH.

Laurel.

Came the appellant by counsel and filed grounds and moved the court to grant an oral argument herein, which motion is submitted.

And afterwards on the 29th day of September, 1904, at a Court of Appeals at the Capitol at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS CO.
v.
COMMONWEALTH.

Laurel.

The court being sufficiently advised, it is considered that appellant's motion for an oral argument be, and the same is, sustained, and said case is passed for oral argument to the next January term.

And afterwards on the 8th day of February, 1905, at a Court of Appeals at the Capitol at Frankfort, the following order was entered, to-wit:

62 "ADAMS EXPRESS COMPANY
v.
COMMONWEALTH.

Laurel.

This case coming on for hearing was argued by John Shindler for the appellant, and N. B. Hays, for the appellee, and submitted, with ten days leave to parties to file briefs.

And afterwards on the 17th day of June, 1905, at a Court of Appeals at the Capitol at Frankfort, the following judgment was entered, to-wit:

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Laurel Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of the appellant ten per cent. damages on amount of the judgment superseded herein, which is ordered certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said date the following opinion was delivered:

63 Court of Appeals of Kentucky June 17, 1905.

(To be reported.)

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KY., Appellee.

Appeal from Laurel Circuit Court.

Opinion of the Court by Judge Settle.

The appellant, Adams Express Company, a common carrier, was indicted, tried and convicted in the Laurel Circuit Court, for the offense of unlawfully, wilfully and knowingly, shipping, procuring for, furnishing, selling and delivering spirituous liquor, by C. O. D. shipment, to one George Meece, at East Bernstadt, in Laurel County, the sale of such liquor being prohibited by certain statutes enacted by the legislature of Kentucky, approved April 4th, 1884,
64 March 10th, 1894, and March 11th, 1902. These acts were then in force in the five counties of Laurel, Rockcastle, Jackson, Owsley and Clay. The trial jury fixed the punishment of appellant at a fine of $60.00, on which judgment was duly entered, and the lower court having overruled its motion for a new trial, it prosecutes this appeal.

In Crigler *vs.* Commonwealth, 27 L. R., 918, it was held by this court that what is known as the "Five Counties Act" of April 4th, 1884, (Acts 1883-4, chap. 598, Vol. 1, page 1116), forbidding the sale of liquors in the five counties named therein, is in force in Laurel County, as is the local option law of March 10th, 1894, together with the amendment thereto, of March 11th, 1902 (See 2557 Ky. Stats.) and that the two acts last mentioned must be construed as a part of the act of 1884, regulating and controlling the former as to procedure, the quantity of liquor sold to constitute an offense, and the punishment. That is, it was held that the local option act of 1894, as amended by that of 1902, is operative in Laurel county without the necessity of a vote by the people, and that of the
65 existence of the act of 1884, and the operation of that of 1894, as amended in 1902, this court will take judicial notice. The fine inflicted against appellant was imposed under the act of 1894, as amended in 1902 (Sec. 2557 Ky. Stats.).

Sub-section 4, section 2557, Kentucky Statutes, which is also a part of the general option law as amended in 1902, provides:

"All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid, or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The offense of which appellant was convicted is the one denounced by the foregoing section, and it is insisted for it that the alleged sale of spirituous liquor for which it was indicted and convicted under the statute, was a mere delivery of the liquor by it as a common carrier in the usual course of business, and the money
66 paid its agent by the consignee was in satisfaction of the amount due the consignor therefor upon a sale thereof made in the State of Ohio, which appellant as a common carrier was under the contract of shipment compelled to collect and remit the consignor upon delivery of the goods. And, further, that the transaction was authorized, and appellant protected, by the law and regulations of interstate commerce.

The case went to the jury upon the evidence of the Commonwealth alone, none having been introduced by the appellant. The undisputed facts establishd by the evidence were:

1st. That George Meece within a year before the finding of the indictment called at appellant's office in East Bernstadt, with his brother, who had ordered and was expecting from Cincinnati a package of whiskey, which he found awaiting him in appellant's office.

2nd. While in the express office, George Meece was informed by appellant's agent in charge that a package containing a gallon of whiskey was then in the office for him, the charge upon which was $3.85. He then informed appellant's agent that he had not
67 ordered the whiskey, was not expecting it, and had not the money with which to pay the charges thereon, but if satisfactory to the agent, and the latter would hold the whiskey for him until the following Saturday, a week later, he would call at the express office, pay for the whiskey and take it away. To all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent $3.85 for the gallon of whiskey, received and took it away.

3rd. The agent knew that the package contained a gallon of whiskey (*i. e.*, four quart bottles), and that it was shipped by Crigler & Crigler, of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whiskey.

4th. The agent also knew the business of Crigler & Crigler, and that they were in the habit of shipping almost daily by express, C. O. D., to appellant's East Bernstadt office, packages of both whiskey and brandy, consigned to persons of that community.

In view of the foregoing facts, it becomes necessary to determine whether, in holding the whiskey a week at Meece's request,
68 and until the latter called again at the office, paid the necessary charges, and took it, the appellant continued in the relation of carrier to the goods, or did it, by the transaction in question, cease to be a common carrier, and become a mere bailee or warehouseman?

On this point, Hutchinson on Carriers, 2nd Ed., sec. 354, states the general rule as follows:

"The law upon this subject may, therefore, be stated to be that, so long as the carrier continues in the relation of carrier to the goods,

he is under an absolute engagement that they shall be delivered only to the person to whom they are consigned; but that when *from any cause,* he ceases to hold them as carrier and becomes a mere warehouseman or bailee, the degree of responsibility resting on him becomes changed, *and from that* moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and diligence."

In section 356, of the same book, it is said:

"It therefore frequently becomes a question of importance, as well as of difficulty, to determine when and under what cir-
69 cumstances the relation of carrier to the goods has ceased and their custody has become a bailment.

"It may be stated as a general rule that when the carrier has done all the law requires him to do towards delivery, *and from any cause he fails to effect it,* and the goods are continued in his possession, he from that time, becomes responsible only as a depositary."

In further elaboration of this doctrine, the author in section 385 tells us:

"But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee *instead of refusing to take them, promises to pay for them and take them in a few days, and requests the carrier to keep them until he is ready to pay for them, the carrier becomes a warehouseman of the goods,* and if they are lost or destroyed while so held, without any fault or negligence of his, he will not be liable, *although he has given no notice of the fact to the consignor.*"

A similar view of the doctrine, *supra,* was announced by this court in Wald & Co. *vs.* Louisville & Evansville and St. Louis R. R. Co., 92 Ky., 645, so we may accept it as the law of this
70 State.

When a package marked "C. O. D." (collect on delivery) is received by an express company for shipment, it is manifestly upon the conditions that such company, as a common carrier, shall promptly deliver it to the consignee, collect of the latter a specified sum therefor, and with equal promptness return it to the consignor. Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking are permitted to charge and are paid more for the transportation of goods than are railroad companies. A failure, therefore, upon their part to immediately—that is in a reasonable, and the customary time—deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman. In view of this rule and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whiskey in question and in receiving the price paid by the latter therefor, appellant did not sustain to that article
71 of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was, or could have been, protected in the transaction, by the law of interstate commerce.

We are aware that section 5258, Revised Statutes, of the United States confers upon railroads and express companies authority to carry freight from one state to another free from interference on the part of the states, and that the Supreme Court of the United States construing this Statute and defining the power of Congress with reference to its right "to regulate commerce with foreign nations, among the several states and with the Indian tribes," has repeatedly held "That state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

It has also been held by the same court that when intoxicating liquors are shipped from one state to another by express, C. O.
72 D., upon an order or instructions from the purchaser residing in such other state, the contract of sale is to be regarded as completed in the state from which the shipment is made, upon the vendor's there delivering the goods to a common carrier, although with the direction to collect the price from the consignee before its delivery to him, and that the right of the importer to thus sell and ship liquors in unbroken packages in another state exists regardless of the local laws of such state prohibiting such sales and shipments, and notwithstanding the provisions of the act of Congress known as the "Wilson Bill," which was intended to enable the several states, under the exercise of the police power, to enact such legislation as would give them the same control over intoxicating liquors shipped therein from other states, after their arrival, whether in original packages or otherwise, as they might exercise over those of home manufacture or production.

But in the case at bar, the conviction of appellant was not in violation of any regulation of the laws of interstate commerce. It sold and delivered to Meece a gallon of whiskey and received of
73 him $3.85 as the price of such sale, all with full knowledge of the fact that it had not been ordered by him. Furthermore, though appellant may have originally received the package of whiskey as a common carrier, at the time of its sale it, as before stated, did not sustain to the package of whiskey, or to the consignor or consignee the relation of carrier, but that of bailee or warehouseman. In other words, the sale was not made in another state, or by a shipper therein, but by appellant at East Bernstadt, in Laurel County, Kentucky, and in violation of the laws of the state, which by sub-section 4, of section 2557, Ky. Stats., makes such a sale a misdemeanor.

Whatever grounds may be urged for holding that this statute is inoperative as to a shipment of spirituous liquors into this state from another state, made by the vendor upon an order received in such other state from the purchaser in this state, it certainly cannot be void as to sale wholly made and consummated in this state by a bailee, after the whiskey was received from another state.

Being of opinion that appellant's conviction was proper, the judgment is affirmed.

74 And afterwards there was filed in the office of the clerk of the Court of Appeals, a petition for rehearing, and which petition is in words and figures as follows, to-wit:

Kentucky Court of Appeals.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Laurel Circuit Court.

Petition for Rehearing.

The appellant respectfully submits:

1. The indictment charged that the Adams Express Company, "a partnership engaged in and carrying on the business of a *carrier* of packages" did unlawfully carry for and deliver to George Meece, a package of intoxicating * * * liquors * * * to be and which was paid for on delivery" * * * said "delivery
75 being made and done at the time by said * * * Adams Express Company *in the usual course of business of said Adams Express Company.*" The offense for which appellant is indicted is the delivery of a package of liquor as a *carrier* in the usual course of business, an offense denounced as this Court says, by subsection 4, of Section 2557, Kentucky Statutes, which makes it an offense for a *"carrier"* to deliver liquor shipped C. O. D., and for which the appellant was convicted under the above mentioned law, as the opinion of this Court expressly states (p. 3) and the charge of the lower court clearly shows (Bill of exceptions, pp. 6 & 7).

In a subsequent part of the opinion (p. 7) the Court says:

"We must conclude that at the time of delivering to Meece * * * appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of *common carrier,* but merely that of a *bailee or* warehouseman."

If this conclusion of the Court is correct the case should be reversed, and the indictment dismissed, because of the fatal variance between the allegations of the indictment and the proof. The
76 appellant is indicted for committing the offense of delivering liquor shipped C. O. D., which under section 2557, sub-section 4, can be committed only by a *carrier,* and *not for selling liquor* as a *warehouseman;* how then, we respectfully ask, can the Court hold that the evidence supports the indictment? There is a fatal variance, and the appellant stands convicted of an offense for which it has never been indicted.

2. The Court in its opinion (pp. 3 & 4) says that the "Undisputed facts established by the evidence were: * * * 2nd. * * * He (Meece) then informed appellant's agent that he *had not ordered the whiskey, was not expecting it.*"

We beg to call the attention of the Court to the evidence and to

submit that the above fact is not established by the evidence, and there is no suggestion in the evidence that such was the fact. On the re-examination of the witness, George Meece (Bill of exceptions, p. 3) the following took place.

Question 28. "How did you find out that whiskey was there?

A. The first I knowed it was there, I went with my brother
77 and he asked if there was a package there for him, and while looking over the books Newland said there was one there for George Meece. I told him I couldn't take it then, but would take it next Saturday, which I did."

The witness subsequently testified that he had not ordered the whiskey, but it no where appears that he told the express agent that "he had not ordered the whiskey, was not expecting it," or that the Express Company, or any of its agents knew either at the time of shipment or delivery that the whiskey had not been ordered.

There was therefore a presumption that the appellant was ignorant of the fact that the liquor had not been ordered, and the shipment and delivery, so far as it was concerned was a legitimate transaction of interstate commerce. Ellington *vs.* State, 86 S. W. Rep., 330 (Tex. Crim. App.) in which the court held that an express agent who delivered a C. O. D. package of liquor in ignorance of the fact that it had not been ordered, was not guilty of a sale in violation of the local option law. If the shipment was not ordered, but the express company was not aware of that fact, there was nothing objectionable or unlawful in what the appellant did. The only
78 effect of the whiskey not having been ordered was that the title remained in the shipper. This did not make it unlawful for the Express Company to carry and deliver the package, but merely left the risk of the shipment with the consignor. Any other doctrine "would remove from the protection of the interstate commerce clause, all goods on consignment upon any condition as to delivery, express or implied." American Express Company *vs.* Iowa, 196 U. S., 133, 144.

3. Although after Meece's request to hold the package for a week, the Express Company's responsibility to the owner of the property may have been changed from that of an insurer to liability for negligence only that did not subject the shipment to the laws of Kentucky prior to the delivery to the consignee, and the appellant has not committed *any* offense in delivering the liquor. Suppose the shipment had been made under a special contract relieving the carrier from all liability for loss of or injury to the shipment not due to its negligence. Could it be properly said that such a contract would alter the character of the shipment, and subject it to the laws of Kentucky at an earlier period than would otherwise be the case? Suppose again, that Meece had been notified, but had failed to call for the package for a week or more, and
79 had then called and taken the package out. In either of the supposed cases during the time the package was held the Company would have been liable only for negligence, and not as a common carrier or insurer, but the package was still in the hands of the interstate carrier, and in the language of the court in

Rhodes *v.* Iowa, 170 U. S., 412, 426, did not become subject to the power of the state of Kentucky "until the arrival at the point of destination and *delivery there to the consignee.*" See also Caldwell *v.* North Carolina, 187 U. S., 622, in which the court held that a shipment of pictures was not subject to the laws of the state, even though they had been delivered to the shipper's agent and he was delivering to the purchasers.

The appellant therefore prays that the case may be set down for further hearing on some day convenient to the court, to the end that it may have an opportunity to present its views on the above noted important questions more at length, either by brief or oral argument, as the court may direct.

LAWRENCE MAXWELL, JR.,
JOHN R. SCHINDEL,
Counsel for Appellant.

W. L. BROWN,
Of Counsel.

80 Be it remembered that on the 18th day of September, —, at a Court of Appeals of Kentucky, at the Capitol at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS COMPANY
v.
COMMONWEALTH.

Laurel.

Came the appellant by counsel, and on motion the petition for rehearing filed in the office of the Clerk of this Court is now noted of record, and moved the court to grant a rehearing, which motion is submitted.

And afterwards on the 4th day of May, 1906, at a Court of Appeals of Kentucky, at the Capital at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS COMPANY
v.
COMMONWEALTH.

Laurel.

The court being sufficiently advised, it is considered that appellant's petition for rehearing, be, and the same is, hereby overruled.

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Adams Express Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
82 stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of June, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Jun- 4 1906. J. Morgan Chinn Cl'k.

83 Copy.

Know all Men by these Presents: That we, Adams Express Company, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto The Commonwealth of Kentucky in the full and just sum of five hundred dollars, to be paid to the said The Commonwealth of Kentucky, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of June, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the State of Kentucky in a suit depending in said Court, between Adams Express Company, appellant, and The Commonwealth of Kentucky, appellee, a judgment was rendered against the said — and the said appellant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Commonwealth of Kentucky citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Adams Express Company shall prosecute said suit to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ADAMS EXPRESS COMPANY. [SEAL.]
LAWRENCE MAXWELL, JR., *Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By LEONARD DAMMANN,
Resident Vice-President.

Attest:
CLAUDE B. BROWN, *Resident Ass't Sec'y.*

Sealed and delivered in presence of—
L. BERT NYE.
E. K. COSTELLO.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Jun- 4 1906 J. Morgan Chinn, Clerk.

84 Court of Appeals of Kentucky.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Assignment of Errors.

Adams Express Company upon the writ of error from the supreme court of the United States, assigns as error—

1. That the transactions on account of which the Adams Express Company was prosecuted and convicted constituted interstate commerce, and was not subject to regulation by the state of Kentucky, and that the statutes of Kentucky under which it was convicted are in conflict with the commerce clause of the constitution of the United States.

2. That the trial court erred in overruling the motion of the Adams Express Company to direct the jury to find that it was not guilty, and in overruling each of the instructions requested by it, which were refused, and in giving each of the instructions on behalf of the Commonwealth, and that the court of appeals of Kentucky erred in affirming the judgment of the trial court.

The Adams Express Company therefore prays that the judgment of the court of appeals may be reversed.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.

[Endorsed:] Filed Jun- 4 1906 J. Morgan Chinn, Clerk.

85 Court of Appeals of Kentucky.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Laurel County, No. 666.

Appeal from Laurel County, No. 685.

Stipulation.

For the purpose of avoiding unnecessary writs of error from the Supreme Court of the United States, it is hereby stipulated and agreed between Adams Express Company and the Commonwealth that the above entitled cases are substantially like the case of Adams Express Company, appellant, *versus* Commonwealth of Kentucky on appeal from Laurel county, in which a petition for rehearing was overruled by this court on May 4 1906, and from the judgment in which case a writ of error from the Supreme Court of the United States was allowed by Mr. Justice Harlan on June 1st, 1906;

and that the above entitled cases shall abide the decision of the supreme court of the United States in said case; and that the mandates of this court shall be stayed pending said decision of the supreme court of the United States, and that the same judgment shall be entered in these cases as shall be ordered by the Supreme Court of the United States in said case, and that this stipulation shall be filed as part of the record in said case in the Supreme Court of the United States.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.
NAPOLEN B. HAYS,
Attorney General.

86 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

I, J. Morgan Chinn Clerk of the Court of Appeals of Kentucky certify that the foregoing pages contain a full and complete transcript of the record in the case of the Adams Express Company appellant *v.* The Commonwealth of Kentucky Appellee Appeal from the Laurel Circuit Court including the judgment and opinion of the Court, as fully as the same appears from the records and files of my office.

And I further certify that there is hereto attached the Original Writ of Error from the Supreme Court of the United States, filed in this office on this day; also a copy of the writ of Error Bond, and a copy of the Assignment of Errors, the originals of which were this day filed in this office, and as the same appears from the files in my office.

In testimony whereof I have hereunto set my hand and caused my official seal to be hereunto affixed. Done at the Capitol at Frankfort, this the Fourth day of June A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of the Kentucky Court of Appeals.

87 UNITED STATES OF AMERICA, *ss:*

To the Commonweath of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Kentucky wherein Adams Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this first day of June, in the year of our Lord one thousand nine hundred and six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Service acknowledged—
J. C. W. BECKHAM,
Governor of Kentucky.

N. B. HAYS,
Attorney General of Kentucky.

Endorsed on cover: File No. 20,296. Kentucky Court of Appeals. Term No. 331. Adams Express Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed June 29th, 1906. File No. 20,296.